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7 EDER NASCIMENTO DA
ENCARNACAO,
8 Plaintiff,
9 v.
10 ANNA BERYOZKINA,
11 Defendant.

Case No. [16-cv-02522-MEJ](#)

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**ORDER SCREENING SECOND
AMENDED COMPLAINT; REQUIRING
DEFENDANT TO RESPOND; SETTING
CASE MANAGEMENT CONFERENCE;
INDICATING REFERRAL TO
FEDERAL PRO BONO PROJECT**

INTRODUCTION

On June 3, 2016, this Court granted Plaintiff Eder Nascimento Da Encarnacao's ("Plaintiff") in forma pauperis application, but dismissed his Complaint with leave to amend. First Screening Order, Dkt. No. 6. Plaintiff filed an amended complaint on June 14, 2016. FAC, Dkt. No. 8. On June 27, 2016, the Court found the Amended Complaint for enforcement of an I-864 Affidavit of Support stated a cognizable claim and directed the Clerk of Court to issue the summons and the U.S. Marshal to serve the Amended Complaint. *Nascimento Da Encarnacao v. Beryozkina*, Case No. 16-cv-2522 (N.D. Cal.) ("*Da Encarnacao I*"), FAC, Dkt. No. 8; Second Screening Order, Dkt. No. 9. A summons was issued, the U.S. Marshal served the Complaint, and Defendant Anna Beryozkina ("Defendant") acknowledged receipt of the summons and Complaint on August 12, 2016. *See* Summons, Dkt. No. 11; Summons Returned Executed, Dkt. No. 17.

After filing his initial complaint in *Da Encarnacao I*, Plaintiff commenced three additional actions. *See* Order of Consolidation, Dkt. No. 28. All four actions appeared to stem from the same alleged course of conduct: Plaintiff alleged Defendant took on the legal obligation to support him financially when she sponsored his immigration to the United States, and she failed to do so. Plaintiff also alleged additional wrongful acts by Defendant, including theft of his immigration

1 and social security documents, assault and battery, and slander. *Id.* The Honorable Donna M.
2 Ryu remanded one of the actions to state court and closed that case. *Nascimento Da Encarnacao*
3 *v. Beryozkina*, Case No. 16-cv-2899 (“*Da Encarnacao II*”), Order of Remand (N.D. Cal. filed
4 Aug. 15, 2016). The undersigned dismissed another action for failing to demonstrate a basis for
5 federal subject matter jurisdiction. *Nascimento Da Encarnacao v. Beryozkina*, Case No. 16-cv-
6 4707 (“*Da Encarnacao III*”), Order Dismissing Compl. (N.D. Cal. filed Oct. 3, 2016).¹ The
7 undersigned then related and consolidated the remaining two actions (*Da Encarnacao I* and
8 *Nascimento Da Encarnacao v. Beryozkina*, Case No. 16-cv-4918 (N.D. Cal.) (“*Da Encarnacao*
9 *IV*”)). *See* Order of Consolidation. The undersigned judge ordered Plaintiff to file a Second
10 Amended Complaint (“SAC”) in consolidated Case No. 16-cv-2522 (*Da Encarnacao I*), where he
11 would join all his claims against Defendant into one complaint. *Id.* As Plaintiff would continue to
12 proceed in forma pauperis (i.e., he has not paid the filing fees to commence suit in this Court), the
13 Court informed Plaintiff it would then screen the SAC pursuant to 28 U.S.C. § 1915(e)(2). The
14 Court also ordered Defendant not to respond to the SAC until ordered to do so.

15 Plaintiff filed a SAC on October 13, 2016. SAC, Dkt. No. 33.² The Court now screens the
16 SAC.

17 **LEGAL STANDARD**

18 As noted above, while the Court previously granted Plaintiff in forma pauperis status, it
19 must still review Plaintiff’s Complaint to determine whether the action may be allowed to proceed
20 under 28 U.S.C. § 1915(e)(2)(B). The Court must dismiss the Complaint if it is frivolous, fails to
21 state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is
22 immune from such relief. 28 U.S.C. § 1915(e)(2)(B). To make this determination, courts assess
23 whether there is a factual and legal basis for the asserted wrong, “however inartfully pleaded.”
24 *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984) (quotation omitted). Pro se pleadings
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26 ¹ The undersigned did not give Plaintiff leave to amend that complaint, but specified that “[t]o the
27 extent Plaintiff wishes to amend to assert allegations he raised in this action against Defendant, he
28 may do so by joining these claims to those he asserts in the Related Case No. 16-cv-2522.” *Id.* at
4.

² All future docket citations are to documents found in *Da Encarnacao I*.

1 are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). Moreover,
2 when dismissing a case, the Ninth Circuit has “repeatedly held that a district court should grant
3 leave to amend even if no request to amend the pleading was made, unless it determines that the
4 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d
5 1122, 1130 (9th Cir. 2000). Thus, unless it is clear that no amendment can cure the defects of a
6 complaint, a pro se plaintiff proceeding in forma pauperis is entitled to notice and an opportunity
7 to amend before dismissal. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

8 SCREENING

9 Upon review of the allegations of the SAC, the Court finds that, liberally construed, Eder
10 Nascimento Da Encarnacao has stated (1) a breach of contract claim for enforcement of an I-864
11 Affidavit of Support; and (2) a claim for intentional infliction of emotional distress (“IIED”).³

12 Plaintiff alleges Defendant signed an I-864 Affidavit of Support to sponsor his
13 immigration into the United States. *See* SAC at 1-2, 5 & Ex. 1 (I-864 Form signed July 13, 2011).
14 He further alleges Defendant has denied him and his son support since July 7, 2015. SAC at 1-2,
15 5. “Federal courts have consistently found that a Form I-864 constitutes a legally binding and
16 enforceable contract between sponsor and a sponsored immigrant. The terms of the Form I-864
17 provide for the appropriate measure of damages that would put plaintiff in as good a position as
18 [he] would have been had the contract been performed. A sponsor may also be held liable for
19 legal fees and other costs of collection.” *Shumye v. Felleke*, 555 F. Supp. 2d 1020, 1024 (N.D.
20 Cal. 2008) (internal quotation marks and citations omitted). Plaintiff accordingly has stated the
21 existence of an enforceable contract between himself and Defendant, has alleged that Defendant
22 breached that contract by failing to support him and his son, and has alleged that he has suffered
23 damages as a result of Defendant’s breach. He has stated a claim for enforcement of an I-864
24 Affidavit of Support.

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26 ³ The Court notes Plaintiff attaches a document from an action pending in Superior Court
27 involving both him and Defendant. *See* SAC, Ex. 6. The Court lacks sufficient information at this
28 time to determine whether the Superior Court action relates to Plaintiff’s claims in this matter, or
whether the ultimate resolution of that state action may impact the Court’s ability to resolve this
matter.

1 To state a claim for IIED under California law, Plaintiff must allege (1) extreme and
2 outrageous conduct by Defendant with the intention of causing, or with reckless disregard for the
3 probability of causing, emotional distress; (2) he suffered severe or extreme emotional distress;
4 and (3) Defendant's outrageous conduct was the actual and proximate cause of his distress. *See*
5 *Sabow v. United States*, 93 F.3d 1445, 1454 (9th Cir. 1996) (citing *Christensen v. Super. Ct.*, 54
6 Cal.3d 868 (1991)). Plaintiff alleges Defendant withheld financial support from him and his son
7 knowing he could not provide basic necessities without her support, stole important documents
8 from him, made false reports to the police accusing him of abusing his child, made false
9 statements about him to third parties, and threatened him with bodily harm, all for the purpose of
10 avoiding compliance with her support obligations. If true, such allegations constitute extreme and
11 outrageous conduct by Defendant, with the intention of, or reckless disregard for the probability
12 of, causing emotional distress. He also alleges the second element of an IIED claim by stating he
13 has been humiliated, he fears for his life, and he has been diagnosed with "depression and panic
14 syndrome" for which he receives treatment, including medication. SAC at 1, 4. Finally, he
15 alleges the distress was caused by Defendant's conduct and her "traumatizing [him] to give up the
16 request for mandatory support." *Id.* Plaintiff thus has stated a claim for IIED.

17 Plaintiff references a number of other issues and grievances against Defendant. Some of
18 them appear to support his IIED and contract claims, but others are not tied to any specific claims
19 and in some instances seek relief that the Court does not have the power to grant. *See, e.g.*, SAC
20 ¶¶ 7-9, 11, 13-15. For clarification, the Court is only permitting Plaintiff to proceed with his
21 contract and IIED claims at this point; it is unclear whether he intends to assert any other claims,
22 and the bases for any additional claims are unclear.

23 Plaintiff's claim for enforcement of an I-864 Affidavit of Support gives rise to federal
24 jurisdiction, and the Court may assert supplemental jurisdiction over the state law claim for IIED.
25 Defendant is not an immune defendant.

26 Having screened the SAC, the Court is satisfied Plaintiff may proceed with this case.

27 **Defendant accordingly shall respond to the SAC by November 22, 2016.**

CASE MANAGEMENT CONFERENCE

Pursuant to Federal Rule of Civil Procedure 16(b) and Civil Local Rule 16-10, a Case Management Conference will be held in this case before the Honorable Maria-Elena James on **December 1, 2016 at 10:00 a.m.** in Courtroom B, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This conference shall be attended by lead trial counsel for parties who are represented. Parties who are proceeding without counsel must appear personally.

IT IS FURTHER ORDERED that no later than seven calendar days before the Case Management Conference, the parties shall file a Joint Case Management Statement containing the information described in the Standing Order for All Judges in the Northern District of California, available at: <http://cand.uscourts.gov/mejorders>. The Joint Case Management Statement form may be obtained at: <http://cand.uscourts.gov/civilforms>. If the statement is e-filed, no chambers copy is required.

REFERRAL

Finally, the Court will enter a separate order referring Plaintiff to the Federal Pro Bono Project for the appointment of counsel for all purposes for the duration of the case.

IT IS SO ORDERED.

Dated: October 25, 2016

MARIA-ELENA JAMES
United States Magistrate Judge